(2)

No. 05-8820

IN THE

Supreme Court of the United States

GARY LAWRENCE,

Petitioner,

—v.—

FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF FLORIDA IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Florida is one of its statewide affiliates. *Amici* respectfully submit this brief to assist the Court in resolving a fundamental issue of equity under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA): Can the state represent to death-row inmates that it will provide them with "quality" counsel in postconviction proceedings, and then argue that their federal habeas petitions should be dismissed because appointed counsel missed a crucial filing deadline? Given its longstanding interest in fair and meaningful access to the courts, the proper resolution of that question is a matter of substantial importance to the ACLU and its members.

STATEMENT OF THE CASE

In March 1995, petitioner Gary Lawrence was convicted of premeditated murder in the first degree and conspiracy to commit murder, and sentenced to death. *See Lawrence v. Florida*, 421 F.3d 1221, 1222 (11th Cir. 2005). On August 28, 1997, the Florida Supreme Court affirmed his convictions and death sentence. *See Lawrence v. State*, 698 So.2d 1219 (Fla. 1997). This Court denied *certiorari* on January 20, 1998, concluding direct review of Lawrence's

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[1] Pursuant to Rule 37.3, letters of consent to the filing of this brief have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part and no person other than *amici curiae*, their members or their counsel made a monetary contribution to this brief.

conviction. *Lawrence v. Florida*, 522 U.S. 1080 (1998).[2]

Although Florida law requires its supreme court to appoint postconviction counsel when the court issues its "mandate affirming a judgment and sentence of death," Fl. R. Crim. P. 3.851, Gary Lawrence was not appointed counsel until August 10, 1998, *see* Case Information/Progress Docket – Santa Rosa, Florida (Case #94000397CFMA), close to seven months after his conviction had become final and more than ten months after the Florida Supreme Court had issued its mandate. *See Lawrence v. State*, No. SC60-85725, Docket Entry of Oct. 2, 1997 (Fla.) (available at http://www.floridasupremecourt.org/). Appointed counsel moved to withdraw on August 31, 1998. Case Information/Progress Docket – Santa Rosa, Florida (Case #94000397CFMA). Lawrence did not receive counsel who took an active role in representing him until November 5, 1998, when the motion to withdraw was granted and counsel from Florida's statutory "registry" system was appointed. *Id.*; *see* FLA. STAT. ANN. §§ 27.701(2); 27.710.

During this period, Florida was in the beginning stages of implementing a new system of providing capital postconviction representation to some death-row inmates through a "registry" of private attorneys. *See generally In re Rules of Criminal Procedure 3.851 & 3.850*, 719 So. 2d 869, 870 (1998). As a result of the chaos created by this transition, in 1998 the Florida Supreme Court took the extraordinary step of tolling the statute of limitations for

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[2] AEDPA's one-year statute of limitations for federal habeas petitions runs from the "conclusion of direct review" of the state court judgment, including the time for filing for *certiorari* or the time necessary for the *certiorari* petition to be resolved. 28 U.S.C. § 2244(d)(1)(A). Thus, Lawrence's one-year limitations period under AEDPA began to run on January 20, 1998. The conclusion of direct review also triggered Florida's one-year statute of limitations for seeking state postconviction relief. *See* Fla. R. Crim. P. 3.851.

state postconviction motions filed on behalf of Lawrence and other death-row inmates who were likely to be appointed registry attorneys. 719 So.2d at 870 & app. B.

When registry counsel was appointed on November 5, 1998, only 67 days remained for Lawrence to file either a state postconviction motion which would have tolled AEDPA's statute of limitations or a federal habeas petition.[3] Counsel filed Lawrence's motion for state postconviction relief on January 19, 1999, with only one day remaining on AEDPA's clock. This motion remained pending in the Florida courts until November 18, 2002, when the Florida Supreme Court affirmed the trial court's denial of state postconviction relief, *Lawrence v. State*, 831 So.2d 121 (Fla. 2002), and issued its mandate. *See Lawrence v. State*, No. SC01-674, Docket Entry of Nov. 18, 2002 (Fla.) (available at http://www.floridasupremecourt.org/).

Under the current law in the Eleventh Circuit, Lawrence had one day from November 18, 2002, to file a petition for federal habeas corpus. *See Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000) ("[T]he time during which a petition for writ of *certiorari* is pending, or could be filed, following the denial of collateral relief in state courts, is not to be subtracted from the running of time for 28 U.S.C. § 2244(d)(1) statute of limitations purposes."). But instead of filing a petition for habeas corpus on November 19, 2002, Lawrence's registry attorney filed a petition for *certiorari* in this Court on January 9, 2003. Court-appointed and court-monitored,[4] registry counsel pursued this course because he was under the mistaken belief that the limitations period

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[3] AEDPA's one-year limitations period is tolled during the pendency of "a properly filed application for State post-conviction or other collateral review." 28 U.S.C. § 2244(d)(2).

[4] Florida law requires that its courts "*shall* monitor the performance of assigned [registry] counsel to ensure that the capital defendant is receiving quality representation." FLA. STAT. ANN. § 27.711(12) (emphasis added).

would remain tolled until after this Court's *certiorari* review of the denial of state postconviction relief.[5]

This Court denied Lawrence's petition for a writ of *certiorari* on March 24, 2003. Meanwhile, on March 11, 2003, Lawrence filed a *pro se* petition for a writ of habeas corpus in the United States District Court for the Northern District of Florida. The district court ultimately barred the petition as untimely under AEDPA because more than one year had elapsed since the state supreme court's denial of postconviction relief; it also declined to apply equitable tolling. *See* Decision and Order, No. 03 Civ. 97 (N.D. Fl. May 27, 2004). The Eleventh Circuit affirmed. *Lawrence v. Florida*, 421 F.3d 1221 (11th Cir. 2005). On March 27, 2006, this Court granted Lawrence's current petition for a writ of *certiorari*. *Lawrence v. Florida*, __ U.S. __, 126 S.Ct. 1625 (2006).

SUMMARY OF ARGUMENT

This case can and should be resolved in the petitioner's favor by holding that AEDPA's one-year limitations period is tolled pending this Court's decision on a timely petition for *certiorari* from the denial of state postconviction relief. Even if the Court disagrees with that

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[5] Counsel was mistaken in the sense that the Eleventh Circuit had previously ruled otherwise, as noted above. The Sixth Circuit has reached the opposite conclusion. *See, e.g., Abela v. Martin*, 348 F.3d 164, 170 (6th Cir. 2003) ("[I]f there is a *certiorari* petition pending to review the validity of the state's denial of such an application for state post-conviction review, the application is still pending . . ." and the AEDPA's statute of limitations is tolled under 28 U.S.C. § 2244(d)(2)) (quotations omitted)). The resolution of that conflict is one of the questions now before the Court. Although *amici* do not address that question in this brief, *see* n.6 *infra*, we agree with petitioner that the Sixth Circuit's view of the law is correct and the AEDPA's limitations period should be tolled when a petition for *certiorari* is pending from the denial of state postconviction review.

conclusion, however, Lawrence's habeas petition was improperly dismissed. AEDPA's filing deadline is subject to equitable tolling, and equitable tolling is appropriate on the facts of this case.[6]

Florida has established a system to provide legal representation for death-row inmates in state postconviction proceedings that heavily relies on the appointment of private attorneys from a state-created registry. *See* FLA. STAT. ANN. § 27.701(2); FLA. STAT. ANN. § 27.710. Registry attorneys are required by statute to continue representing their clients through federal habeas review. FLA. STAT. ANN. § 27.711 (1) (c). Florida's system of registry counsel requires its courts to "monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation," including the "fil[ing] of appropriate motions in a timely manner." FLA. STAT. ANN. § 27.711(12).

Numerous courts have held that habeas petitioners are entitled to equitable tolling when their filings are late due to reliance on inaccurate representations or unfair actions by the courts or a state. *Amici* submit that equitable tolling should similarly be available where as here, and in a profoundly troubling number of other Florida cases: 1) the cause of a petitioner's late habeas filing is the extraordinary circumstance of his detrimental reliance on Florida's representation that its courts will monitor state-selected counsel to ensure they are providing "quality representation," including filing appropriate pleadings in a timely manner; and 2) the petitioner neither has engaged in dilatory tactics nor had reason to believe that counsel would fail to meet AEDPA's statute of limitations.

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[6] This brief addresses only the issues raised by the third Question Presented in the petition for *certiorari*. *Amici* also support petitioner's position on Questions 1 and 2, although we have not separately briefed them.

ARGUMENT

A PETITIONER'S DETRIMENTAL RELIANCE ON FLORIDA'S REPRESENTATION THAT ITS COURTS WILL MONITOR THE PERFORMANCE OF HIS REGISTRY ATTORNEY TO ENSURE "QUALITY REPRESENTATION," INCLUDING THE FILING OF "APPROPRIATE MOTIONS IN A TIMELY MANNER," IS AN EXTRAORDINARY CIRCUMSTANCE WARRANTING APPLICATION OF EQUITABLE TOLLING.

Florida has established a registry of attorneys to provide legal representation for many death-row inmates in state postconviction proceedings. *See* FLA. STAT. ANN. § 27.701(2); FLA. STAT. ANN. § 27.710.[7] In creating that system, Florida has expressly pledged to death-row inmates, like Lawrence, that the state courts will "monitor the performance of assigned counsel to ensure that the capital

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[7] Until 1998, almost all non-conflict capital cases in Florida were handled by three regional (northern, southern, and middle) offices of "capital collateral counsel." FLA. STAT. ANN. § 27.701(1). In 1998, Florida enacted legislation creating a "'registry' of attorneys in private practice who are available to be appointed to represent defendants in postconviction capital collateral proceedings." 1998 Fla. Laws ch. 98-197, § 3 (creating section 27.710 of the Florida Statutes). This 1998 law, and its 2000 amendment, effectively channeled some of the cases that had previously been handled by capital collateral counsel to private attorneys listed on the "registry." *See* FLA. STAT. ANN. § 27.710(5); 2000 Fla. Laws ch. 2000-3, § 11 (amending FLA. STAT. ANN. § 27.710(5), as originally set forth in 1998 Fla. Laws ch. 98-197, § 3). In 2003, Florida enacted further legislation eliminating the office of capital collateral counsel for the northern region of the state and, in a pilot program, expanding the registry system to handle cases arising in that region. *See* 2003 Fla. Laws ch. 2003-399, § 84 (creating FLA. STAT. ANN. § 27.701(2)).

defendant is receiving quality representation," including the "fil[ing] of appropriate motions in a timely manner." FLA. STAT. ANN. § 27.711(12). [8] Despite that assurance, Florida has repeatedly and often successfully moved to dismiss habeas petitions filed by registry counsel as untimely under AEDPA to the obvious detriment of death-row inmates who are then foreclosed from ever seeking federal habeas review.

As demonstrated below, equitable principles of basic fairness demand the application of equitable tolling where as here, and in a profoundly troubling number of other Florida cases:

1) the cause of a petitioner's late habeas filing is the extraordinary circumstance of his detrimental reliance on Florida's representation that the state courts will monitor state-selected counsel to ensure they are providing "quality representation," including filing appropriate pleadings in a timely manner; and
2) the petitioner has neither engaged in dilatory tactics nor had reason to believe counsel would fail to meet AEDPA's deadline.

[8] Florida's provision of postconviction counsel to capitally-sentenced prisoners includes representation in "one series of collateral litigation of an affirmed conviction and sentence of death, including the proceedings in the trial court that imposed the capital sentence, any appellate review of the sentence by the Supreme Court, any *certiorari* review of the sentence by the United States Supreme Court, and any authorized federal habeas *corpus* litigation with respect to the sentence." FLA. STAT. ANN. § 27.711 (1) (c).

A. Detrimental Reliance On Florida's Pledge That Its State Courts Will Ensure That Registry Counsel Is Providing Quality Representation, Including The Timely Filing Of Motions, Is An Extraordinary Circumstance Warranting Equitable Tolling.

Equitable tolling of the AEDPA's statute of limitations for filing a federal habeas corpus petition set forth in 28 U.S.C. § 2244(d)(1) is appropriate where: (1) the petitioner has been prevented from asserting his rights in some extraordinary way, and (2) the petitioner has exercised reasonable diligence. *See, e.g., Merritt v. Blaine*, 326 F.3d 157, 168 (3d Cir. 2003); *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999) (*per curiam*) (explaining that AEDPA's statute of limitations can be equitably tolled where a petitioner "untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence"); *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000).

This Court has recognized that equitable tolling of AEDPA's statute of limitations can be appropriate when the cause of the late filing is a petitioner's detrimental reliance on representations by either the courts or a state. *See, e.g., Pliler v. Ford*, 542 U.S. 225, 234 (2004) (remanding to 9th Circuit to consider whether "Court of Appeals' concern that respondent had been affirmatively misled" by magistrate judge provides justification for equitable tolling of statute of limitations); *id.* at 235 (O'Connor, J., concurring) ("if the petitioner is affirmatively misled . . . by the court or the State . . . , equitable tolling might well be appropriate" and "[t]his is a question for the Ninth Circuit to consider on remand"); *id.* (Stevens, J., concurring in the judgment) (endorsing majority's approach of "remanding to the Ninth Circuit to determine the propriety of equitable tolling"); *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (suggesting that detrimental reliance constituted an extraordinary

circumstance warranting equitable tolling, but ultimately declining to decide petitioner's contention that "state law and Third Circuit exhaustion law created a trap on which [he] detrimentally relied as his federal time limit slipped away" because petitioner was far from diligent in pursuing his claims).

Similarly, the federal courts of appeals have held that equitable tolling can be appropriate when petitioners reasonably rely to their detriment on representations or actions of the courts,[9] the prosecution,[10] court personnel,[11]

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[9] *See Keenan v. Bagley*, 400 F.3d 417, 421 (6th Cir. 2005) (remanding for determination whether petitioner "reasonably viewed the Ohio Supreme Court's order [which was issued after expiration of state court limitations period and which stayed petitioner's execution and afforded six months in which to file for state postconviction relief] as granting him extra time to properly file a petition for state postconviction relief . . . [and] [reasonably] assumed that any time spent pursuing this avenue would toll his federal statute of limitations"); *Griffin v. Rogers*, 399 F.3d 626, 635-38 (6th Cir. 2005) (finding that petitioner, whose mixed petition was dismissed for lack of "total exhaustion" and who relied on federal court's assurance that federal review could be sought after return to state court, was entitled to equitable tolling even though petitioner did not file state-court petition until half a year later, given that petitioner "had no reason to know that she was required to file within 30 days of her dismissal from federal court" and, "[i]n the absence of any known deadline, six months for preparation and filing by a busy public defender's office is not unreasonable").

[10] *See King v. Bell*, 378 F.3d 550, 553, 554 (6th Cir. 2004) (granting equitable tolling because "government's failure to produce the *voir dire* transcripts prevented [petitioner] from complying with the court's original scheduling order").

[11] *See Burger v. Scott*, 317 F.3d 1133, 1143 (10th Cir. 2003) (granting equitable tolling for four-month period between prisoner's deposit of state postconviction petition in prison mail and date on which documents were stamped "filed" by state court because "substantial circumstantial evidence" suggested that "court was in possession of the petition during the entire four-month period," notwithstanding its delay in affixing file stamp to documents); *Knight v. Schofield*, 292 F.3d 709, 709-10 (11th Cir. 2002) (*per curiam*) (granting equitable tolling for prisoner, who was assured by "Georgia Supreme Court clerk . . . that he would be notified

prison personnel,[12] or unclear law.[13] In the extraordinary circumstance where such reliance results in a petitioner missing a filing deadline, equitable tolling protects against the unduly harsh and unfair result of the petitioner losing the right to pursue potentially meritorious claims.

Just as petitioners are entitled to equitable tolling when their filings are late due to reliance on inaccurate representations or unfair actions by the courts or a state, so too are they entitled to equitable tolling when they detrimentally rely on a state's representation that it will provide them quality counsel, including the timely filing of pleadings, and their state-selected, state-monitored counsel fail to meet AEDPA's time bar. *Amici* recognize that litigants ordinarily bear the risk of the mistakes made by their counsel. *See, e.g., Rouse v. Lee*, 339 F.3d 238, 249 (4th Cir. 2003) (relying on agency principles to deny equitable tolling to petitioner whose postconviction counsel violated

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as soon as a decision was made," but in fact was belatedly informed of decision because clerk "inadvertently sent notice of the decision to the wrong person," until "the day he received [actual] notice of the final denial of the Georgia Supreme Court"); *Corjasso v. Ayers*, 278 F.3d 874, 878-80 (9th Cir. 2002) (granting equitable tolling for delay caused by mishandling of *pro se* papers by district court clerk's office).

[12] *See Stillman v. LaMarque*, 319 F.3d 1199, 1202-03 (9th Cir. 2003) (granting equitable tolling because "prison litigation coordinator promised Stillman's lawyer to obtain Stillman's signature in time for filing, but then broke his promise, causing the filing to be late").

[13] *See Banks v. Horn*, 271 F.3d 527, 534 (3d Cir. 2001) (precluding tolling for "properly-filed" state postconviction motion under 28 U.S.C. § 2244(d)(2), but granting equitable tolling to petitioner whose second application for state postconviction relief had been barred as untimely because "the state of the Pennsylvania law regarding the nature of the filing requirement was unclear, and [petitioner] could reasonably have viewed the state time limit as a mere statute of limitations subject to equitable tolling, not, as the Pennsylvania Supreme Court later held [in petitioner's own case], a jurisdictional requirement"), *rev'd on other grounds*, 536 U.S. 266 (2002).

AEDPA's time bar). But the rationale for this assignment of risk cannot reasonably be applied where (a) *state* and its *courts – not the petitioner* – have chosen the lawyer and have assured the petitioner that the courts will ensure quality representation, including the timely filing of motions, and (b) where the petitioner detrimentally relies on this assurance and then merely seeks equitable tolling of a federal statute of limitations that counsel has missed.

To its credit, Florida itself has formally acknowledged that problems arising from the appointment of registry counsel to represent capitally-sentenced defendants in postconviction proceedings may require equitable tolling, at least in some circumstances. Thus, in *In re Rules of Criminal Procedure 3.851 & 3.850*, 719 So.2d 869, app. B (Fla. 1998), the Florida Supreme Court tolled the state's own one year deadline for filing state postconviction motions for a specified list of capital defendants, including Lawrence, who were eligible for the appointment of registry counsel under the then newly-enacted law. *Id.* at 871 (tolling statute of limitations set forth in Fla. R. Crim. P. 3.851(d)(1)). Absent equitable tolling, numerous capitally-sentenced defendants would have lost their right to pursue state postconviction remedies through no fault of their own during this transition period. As the state supreme court explained, "the registry of attorneys will have to be established before trial courts can appoint private counsel as required by the legislation and [] a large number of attorneys will need to be included in the registry because of the many capital postconviction defendants that may fall within the categories under which private counsel will have to be appointed." *Id.* at 870.

The Florida Supreme Court had no power, of course, to toll AEDPA's statute of limitations. That is up to the federal courts. There is no reason, however, why the principle of equitable tolling should depend on whether the state's failure to ensure the timely filing of postconviction

pleadings, as promised, is the result of problems occurring at the inception of the registry counsel program or at later stages of its implementation.

The record in *Damren v. Crosby*, No. 03 Civ. 0039 (M.D. Fla.), vividly illustrates the problem. In the process of reassigning cases to registry counsel, the Florida courts did not assign Damren registry counsel until October 12, 1998, nine months after his conviction had become final. *See* Docket No. 60 at 2, 4. Unfortunately for Damren, the Florida Supreme Court's order did not, and obviously could not, toll AEDPA's statute of limitations. Under the AEDPA, registry counsel had approximately two months remaining to file a federal habeas petition after Damren's state postconviction challenges concluded in 2003, and counsel missed the deadline.

To be sure, a party seeking equitable tolling must act diligently and reasonably to preserve his rights. *Pace*, 544 U.S. at 418 & n.8. But reliance on registry counsel who is allegedly being monitored by the state to ensure quality representation, including the timely filing of pleadings, hardly demonstrates a lack of diligence by death-row inmates who took the state at its word. On this record, there is nothing to suggest that petitioner should have been on notice that his attorney would not abide by AEDPA's filing deadline, *Williams v. Taylor*, 529 U.S. 420, 442 (2000) (examining due diligence in the context of whether a petitioner's failure to develop a factual record in state court precludes a fact hearing in federal court). Nor is there any evidence that "petitioner engaged in intentionally dilatory litigation tactics." *Rhines v. Weber*, 544 U.S. 269, 278 (2005) (setting forth test for determining whether a petition may be stayed so that petitioner may return to state court to exhaust federal claims in state court).

Under these circumstances, habeas petitioners like Lawrence should not be deprived of equitable tolling

because they failed to assume that the state would default on its pledge of "quality representation," and thus never attempted to navigate on their own what this Court has aptly described as the exceedingly complicated nature of capital and federal habeas jurisprudence. *See Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring) ("The complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law."); *Rhines*, 544 U.S. at 279 (Souter, J., concurring) (noting that "*pro se* petitioners (as most habeas petitioners are) do not come well trained to address" such "trick[y]" habeas matters as exhaustion).[14] That is especially true in this case because Lawrence lacked anything close to the intellectual capacity to monitor his registry attorney's performance himself: he suffers from "a limited intellectual ability, impairment of judgment, [and] educational deprivation." Sentencing Tr. (Mar. 17, 1995) at 490.

In any event, filing a timely *pro se* federal petition as insurance in case counsel is late in filing – even assuming the local rules permit such a *pro se* filing, which is often not the case, *see, e.g.*, United States District Court for the Northern District of Florida Local Rule 11.1(D) – hardly serves the ends of judicial efficiency or even a petitioner's own interests. If represented litigants were required to file their own *pro se* habeas petitions to comply with AEDPA's time bar, the courts would be inundated with repetitive filings that, among other things, would increase the risk that later petitions filed by counsel would be rejected as successive.

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[14] Because of the procedural default and exhaustion doctrines applicable to federal habeas review, thorough knowledge of both capital and federal habeas jurisprudence is essential. *See generally* ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, No. 10.15.1 & Commentary (2003).

See 28 U.S.C. § 2244(b).

The availability of equitable tolling when a habeas petitioner has detrimentally relied on a state's assurance that it will provide quality representation, including the timely filing of appropriate pleadings, does not depend on a constitutional right to counsel. *See, e.g., Young v. United States*, 535 U.S. 43, 47-48, 49-50 (2002) (holding that "lookback period" in 11 U.S.C. § 507(a)(8)(A)(i) of Bankruptcy Code subject to traditional equitable tolling principles; "[i]t is hornbook law that limitations periods are customarily subject to equitable tolling") (internal quotation marks omitted). *See also Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989) ("Time requirements in lawsuits between private litigants are customarily subject to equitable tolling").[15] It does not require the Court to address the merits of petitioner's underlying claim. And it does not require the Court to second-guess the strategic judgments of appointed counsel. The relief that petitioner is seeking in this case is therefore quite limited. It is, nonetheless, essential to achieve elemental fairness and to ensure that the state does not benefit from its own misrepresentations, especially when someone's life is at stake.

Florida has, too often, done precisely that. As detailed below, the state has frequently and often successfully sought to dismiss federal habeas petitions filed on behalf of death-row inmates based on a failure by state-selected and state-monitored registry counsel to meet AEDPA deadlines. Equitable tolling is both necessary and appropriate under these circumstances. Without it, many petitioners in Florida may be executed without a federal

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[15] Equitable tolling principles are, of course, doctrinally distinct from the traditional analysis of the effectiveness of counsel provided under the Sixth and Fourteenth Amendments. *See generally Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) (requiring objectively unreasonable attorney errors which cause a reasonable probability of a different outcome to make showing of ineffective assistance of counsel).

court ever reviewing their habeas claims, even if they did not engage in dilatory tactics, *Rhines*, 544 U.S. at 278, and had no reason to believe counsel would fail to meet AEDPA's deadline. *See Williams*, 529 U.S. at 442. This unconscionable outcome will serve neither the hallowed purpose of the Great Writ nor Florida's interest in just capital judgments.[16]

B. Florida Has Not Fulfilled Its Pledge That "Quality" Counsel Will File Appropriate Pleadings "In A Timely Manner."

The results of Florida's unfulfilled pledge of "quality representation" are unsettling. As the following chart demonstrates, Gary Lawrence is one of eight men sentenced to death in Florida, six represented by registry counsel, who since 2004 have had their federal habeas petitions rejected as untimely (appeals, petitions for *certiorari*, and/or requests for certificates of appealability ("COA") are pending in six

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[16] *See, e.g., House v. Bell*, __ U.S. __, 2006 WL 1584475, * 14 (June 12, 2006) (citing *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) (cautioning that "[d]ismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty")); *Reed v. Ross*, 468 U.S. 1, 10 (1984) (noting the writ's purpose to "'interpose the federal courts between the States and the people, as guardians of the people's federal rights-to protect the people from unconstitutional action'") (quoting *Mitchum v. Foster*, 407 U.S. 225, 242, (1972)); *Hensley v. Mun. Court*, 411 U.S. 345, 349-50 (1973) ("[H]abeas corpus is not a static, narrow, formalistic remedy, but one which must retain the ability to cut through barriers of form and procedural mazes.") (internal quotation marks and citations omitted); FLA. STAT. ANN. § 27.7001 ("It is the intent of the Legislature to . . . provide for the collateral representation of any person convicted and sentenced to death in this state, so that collateral legal proceedings to challenge any Florida capital conviction and sentence may be commenced in a timely manner and so as to assure the people of this state that the judgments of its courts may be regarded with the finality to which they are entitled in the interests of justice.").

of these cases):

Case Name and Citation:	How late habeas or state postconviction petition filed:
Lawrence v. Florida, 421 F.3d 1221 (11th Cir. 2205), *cert. granted*, __ U.S. __, 126 S.Ct. 1625 (2006).	If this court resolves Question I against Petitioner, he filed his *pro se* habeas petition, while advised by registry counsel, close to four months late.
Howell v. Crosby, 415 F.3d 1250 (11th Cir. 2005), *cert. denied*, __ U.S. __, 126 S.Ct. 1059 (2006).	Registry counsel filed state postconviction motion *fourteen months* after conviction became final, failing to toll AEDPA's clock for later filing.
Cole v. Crosby, No. 05 Civ. 222, 2006 WL 1169536 (M.D. Fla. May 3, 2006), COA request pending, No. 06-13090 (11th Cir.)	"Capital collateral counsel," FLA. STAT. ANN. § 27.701 (1), filed close to sixteen months late.
Wainright v. Crosby, No. 05 Civ. 0027, Dec. and Order, (M.D. Fla. Mar. 10, 2006), appeal pending (11th Cir.).[17]	Registry counsel filed approximately two months late.

[17] The dockets and documents cited for each case which lacks a reported decision may be found on the web site for the respective court by linking to the court's Public Access to Court Electronic Records ("PACER") or Case Management/Electronic Case Filing ("CM/ECF") system. *See, e.g.*, https://ecf.flnd.uscourts.gov/cgi-bin/login.pl (Northern District of Florida). The date noted in each such citation is the date on which the

Sweet v. Crosby, No. 03 Civ. 00844, Dec. and Order, (M.D. Fla. Aug. 5, 2005), appeal pending, No. 05-15199 (11th Cir.).	Registry counsel filed approximately two years late.
Banks v. Crosby, No. 03 Civ. 0032, Dec. and Order (N.D. Fla. July 29, 2005).	Registry counsel filed state postconviction motion *fourteen months* after conviction became final, failing to toll AEDPA's clock for later filing.
Foster v. Crosby, No. 03 Civ. 109, Dec. and Order (N.D. Fla. Dec. 13, 2004), COA denied, 05-10344 (11th Cir. Sept. 30, 2005), *cert.* pending.	Registry counsel filed approximately one year late.
Downs v. Crosby, No. 01 Civ. 139, Dec. and Order (M.D. Fla. Oct. 21, 2004), COA request pending, No. 05-10210 (11th Cir.).	Capital collateral counsel filed approximately one year late.

In addition, the following chart shows that eight other inmates on Florida's death row – all represented by registry counsel – have federal habeas petitions pending that the state is arguing should be barred as untimely:

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court ruled that the petition would be rejected as untimely.

The Eleventh Circuit has not yet docketed the appeal in *Wainright v. Crosby*, though a notice of appeal has been filed in the district court, which has transmitted relevant parts of the record to the Eleventh Circuit. PACER does not make clear whether a COA has been issued or requested in this case.

Case Name and Citation:	State's Contention:
Holland v. Crosby, No. 06 Civ. 20182 (S.D. Fla.).	Thirty-eight days after registry counsel missed deadline, petitioner filed *pro se*.
Brown v. Crosby, No. 06 Civ. 00142 (M.D. Fla.).	Registry counsel filed approximately one year late.
Asay v. Crosby, No. 05 Civ. 00147 (M.D. Fla.).	Registry Counsel filed approximately seven months late.
Hamilton v. Crosby, No. 05 Civ. 813 (M.D. Fla.).	Registry counsel filed state postconviction motion *more than fourteen months* after conviction became final, failing to toll AEDPA's clock for later filing.
Johnson v. Crosby, No. 05 Civ. 23293 (S.D. Fla.).	Registry counsel filed state postconviction motion *more than three years* after conviction became final, failing to toll AEDPA's clock for later filing.[18]

[18] The St. Petersburg Times reported that Johnson's registry attorney publicly admitted in 2000 that he missed the deadline and withdrew from the case without filing either a state post-conviciton motion or a habeas petition, because although he knew that the field of postconviction litigation was "specialized, [he] did not know to what extent." The attorney reportedly admitted that "[i]t was a terrible mistake for [him] to get involved" as registry counsel. Jo Becker, *System May Be Slowing*

Gordon v. Crosby, No. 04 Civ. 0035 (M.D. Fla.).	One month after registry counsel missed deadline, petitioner filed *pro se*.
Damren v. Crosby, No. 03 Civ. 0039 (M.D. Fla.).	Registry counsel filed approximately seven months late.
Thomas v. McDonough, 03 Civ. 00237 (M.D. Fla.).	Registry counsel filed approximately fifteen months late.[19]

In short, notwithstanding Florida's assurance of "quality" representation, including the filing of appropriate pleadings in a timely manner, the legal representation provided by the state and purportedly monitored by its courts has led directly to an intolerably long list of capitally-sentenced defendants who may never have an opportunity to pursue federal habeas review.

C. Florida Has Long Known That Its Registry Counsel System Is In Crisis, Including Repeated Failures To File Timely Pleadings.

Florida and its courts have long known about the severe deficiencies of the registry counsel system. Charged with overseeing registry counsel, FLA. STAT. ANN. § 27.711 (12), the Florida courts became aware as early as 1998 that the transition from capital-collateral relief counsel to registry

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Appeals: Introduced as a Way to Streamline the Death Penalty Process, a Registry System Using Private Defense Attorneys Has Led to Delays, Critics Say, ST. PETERSBURG TIMES, July 17, 2000, at 1B.

[19] In three of these cases, *Asay*, *Damren*, and *Thomas*, the district court has assigned a separate attorney to argue for equitable tolling of the statutory deadline. *See, e.g., Asay v. Crosby*, No. 05 Civ. 00147, Order (M.D. Fla. Feb. 27, 2006) (omnibus order pertaining to all three cases).

counsel had created a backlog of people on death row who had no lawyers, even while AEDPA's one-year clock was running. *See In Re Rules of Criminal Procedure 3.851 & 3.850*, 719 So.2d 869 (Fla. 1998) (addressing practical implications of newly-enacted FLA. STAT. ANN. § 27.710 (5)). As the Florida Supreme Court stated, in that year, "the registry of attorneys will have to be established before trial courts can appoint private counsel as required by the legislation and . . . a large number of attorneys will need to be included in the registry because of the many capital postconviction defendants that may fall within the categories under which private counsel will have to be appointed." *Id.* at 870.

According to Florida Bar and media reports, Florida legislators and Florida Supreme Court justices have repeatedly complained publicly, including in Florida's legislative record, about the poor quality of representation from registry attorneys. *See* Carl Jones, *State Officials Appeal to Florida Supreme Court on Attorney Fee Caps*, DAILYBUSINESSREVIEW.COM, May 15, 2006 (reporting that while Governor "argues that private lawyers are better and cheaper. . . [,] many legal experts, Democrats in the Legislature and some Republican Legislators, disagree. . . . State Senator Victor Cris, R-Tampa, a member of the Commission on Capital Cases . . . criticized the 2003 switch from the statewide [Capital Collateral Regional Counsel] system to the mixed system using both state-employed and registry lawyers. 'We had a system that wasn't broke and was functioning well before we went into this private counsel . . .") (available without payment at http://www.aclufl.org/news_events/alert_archive/index.cfm?action=viewRelease&_emailAlertID=1856 (last visited June 14, 2006); Jan Pudlow, *Justice Rips Shoddy Work of Private Capital Case Lawyers*, THE FLORIDA BAR NEWS, March 1, 2005 (recording remarks of Florida Supreme Court Justice Raoul Cantero during Florida Senate Committee on Justice

meeting of February 16, 2005: "*I think some of the worst lawyering I've seen is from some of registry counsel*, unfortunately. If you look at some of the oral arguments, you will understand why. It seems to me some registry counsel have little or no experience in death penalty cases. They have not raised the right issues, from our review of the record. . . In arguments, they are unable to respond to questions or don't know what the record shows. They don't have a real good understanding of death penalty cases, I don't think.") (emphasis added). Chief Justice Barbara Pariente wrote a letter to Roger Maas, Executive Director of the Commission on Capital Cases,[20] in which she stated: "As for registry counsel, *we have observed deficiencies and we would definitely endorse the need for increased standards for registry counsel, as well as a continuing system of screening and monitoring to ensure minimum levels of competence.*" *Id.* (emphasis added).

The severe deficiencies in the registry counsel system were well known in 2003, when Florida expanded the registry system to cover the northern region of the state. *See Death Appeals Not Quite Dead*, DAILYBUSINESS REVIEW.COM, April 30, 2003 (reviewing several problems with registry counsel, including missed federal deadlines, attempting to charge clients additional funds for their work, and charging Florida exorbitant sums for shoddy work) (available without payment at http://www.fadp.org/news/bizrev_5_20.html) (last visited June 1, 2006). Interviewed for a 2003 article, Mr. Maas cautioned against proposals to eliminate the other two regional offices of Capital Collateral Regional Counsel because "there are

[20] Florida's Commission on Capital Cases oversees the registry. FLA. STAT. ANN. § 27.2710 (1). The Commission is a six-member body, including two members appointed by Florida's governor, two members appointed by the Florida's Senate, and two members appointed by its House of Representatives. FLA. STAT. ANN. § 27.709. The Commission is staffed by Florida's Office of Legislative Services. *Id.*

problems with the registry. There's an inability to directly control the lawyers, to make sure the cases are being worked." *Id.* Demonstrating that the Florida legislature was aware of these problems, the article also reviewed several changes to the registry system recommended by Florida's Legislative Accountability Office, including a recommendation for increased training and additional prior experience. *Id.*

In fact, Florida was on notice of the registry system's deficiencies as early as 2000, two years after its creation, when reports emerged that registry attorneys were failing to provide quality representation and that their failures included missing deadlines for filing federal habeas corpus petitions. *See* Becker, *supra* n.21, at 1B. The Becker article reported that "[i]n six of the cases in which private attorneys are being paid to pursue required death penalty appeals, lawyers have blown deadlines that could preclude their clients from having their claims heard in federal court." *Id.* The article also suggested that the fault for missed deadlines was attributable in part to the Commission on Capital Cases itself because the "training manual Maas gave the [registry] lawyers as recently as January [of 2000] mistakenly said there are no federal deadlines, a point later corrected." *Id.*

Thus, Florida has long known that, despite its assurance of "quality representation," its registry system has repeatedly resulted in missed habeas deadlines.

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Florida induces reasonable reliance by capitally-sentenced persons on its pledge to ensure, through court monitoring, the quality of registry attorneys, including the filing of appropriate pleadings in a timely manner. Petitioners on Florida's death row may obtain fair review of their capital sentences only through extraordinarily complicated and intertwining state and federal judicial procedures. When they are assigned registry counsel, they

have no choice but to accept counsel's representation, backed by Florida's pledge to monitor such representation, or to forgo such representation by appearing *pro se* and attempting to navigate this labyrinthine system without the aid of counsel. So long as a petitioner has otherwise acted with due diligence, his detrimental reliance on the state's representation of "quality" counsel is an extraordinary circumstance warranting the application of equitable tolling if registry counsel misses the AEDPA's clear filing deadline. It is certainly not unfair for Florida to bear the cost of a petitioner's detrimental reliance on its misrepresentation by limiting the state's ability to rely on the AEDPA's statute of limitations. And for a petitioner who detrimentally relied on Florida's unfulfilled assurance of quality representation by an attorney who will file timely pleadings, surely equitable tolling, merely providing the petitioner a chance to be heard on federal habeas review, is the only fair and just result.

CONCLUSION

For the reasons stated herein, the judgment below should be reversed.

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